IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 435 of 1995

with

CRIMINAL APPLEAL No 491 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VAJU GAGJI VANJA

Versus

STATE OF GUJARAT

Appearance:

MR BS SUPEHIA for Appellants

MS NANDINI JOSHI APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE J.R.VORA

Date of decision: 10/01/2002

COMMON ORAL JUDGEMENT (Per : MR.JUSTICE J.M.PANCHAL)

1. Both the above numbered Appeals, which are filed under Section 374(2) of the Code of Criminal Procedure, 1973, are directed against the judgment dated February 15, 1994, rendered by the learned Addl. Sessions Judge, Bhavnagar, in Session Case No. 34/1994, by which the appellant in each Appeal is convicted of the offences punishable under Section 376 of the Indian Penal Code and Section 3(1)(xi) as well as 3(2)(v) of the Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and punished with RI for 7 years and fine of Rs. 500/- in default RI for one year for the offence punishable under Section 376 of the IPC as well as RI for three years and fine of Rs. 500, in default, RI for six months, for the offence punishable under Section 3(1)(xi) of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (the "Atrocities Act" for short) and imprisonment for life for the offence punishable under Section 3(2)(v) of the Atrocities Act.

2. The prosecutrix i.e. Sharadaben Kesubhai, was aged about 14 years at the relevant time and was residing at village Usarad, Taluka Sihor, District Bhavnagar, with her mother named Potiben Lakhabhai and two brothers, named, Manoj and Jitu. It needs to be mentioned that Manoj, at the relevant time, was aged 12 years and was crippled, whereas Jitu was aged 10 years, when the incident in question had taken place. On July 20, 1994, the mother of the prosecutrix had gone to do labour work whereas the prosecutrix was present in her house with her brothers. At about 7.00 p.m., the mother had returned home but found that food was not cooked by the prosecutrix. Therefore, the mother had scolded the prosecutrix and asked her to bring match box from the market. Accordingly, the prosecutrix in the company of her younger brother Jitu had proceeded towards a shop for the purpose of purchasing a match box. While on way, the prosecutrix had thought that she would be further scolded by her mother after her return to home and, therefore, on the pretext of answering nature's call, she had left the company of her brother Jitu for the purpose of going to the residence of her grand father, who is staying at Siddharth Society, Sihor Town. On way, she had come near the cabin of one Kameshbhai Rathod and started crying, as a result of which, several persons had gathered there. On inquiry being made by Kameshbhai Rathod and others, the prosecutrix had informed them that her desire was to

go to Sihor town, and as it was 8.00 p.m. a rickshaw was engaged and the driver of the rickshaw was asked to drop her at Sihor. The rickshaw was being driven by Bharvad Chota Vagha, who is appellant in Criminal Appeal No. 491/95. Part of the seat of the driver was also occupied by Vajubhai Gajibhai Vanja, who is appellant in Criminal Appeal No.435/95, whereas two persons had occupied the seat meant for passengers. When the rickshaw had crossed culvert, another rickshaw had come from the opposite direction and the passengers as well as the two appellants and the prosecutrix were asked to alight from the rickshaw. After alighting from the rickshaw, the passengers had gone away but the appellants had taken the prosecutrix to a field where she was asked to have sexual intercourse with them. On refusal by the prosecutrix, the appellant in Criminal Appeal No.435/95 had taken out a knife and threatened her with knife and after putting her in fear of life, both the appellants had committed rape on her one after another. After committing the rape on the prosecutrix, the appellants had gone away whereas the prosecutrix had gone to the house of her maternal uncle Ratnabhai Lakhabhai. Meanwhile, Jitu who is brother of the prosecutrix, had, on return to home, informed his mother that prosecutrix had not returned after she had gone to answer the nature's call. Therefore, the mother of the prosecutrix had gone to the house of her brother, who had lodged an information at the Police Station indicating the fact that the prosecutrix was missing. On return to the house of her maternal uncle, the prosecutrix was asked questions by her mother as well as maternal aunt, and the prosecutrix had narrated the incident to them. Thereupon, the mother of the prosecutrix had decided to lodge complaint against the appellants and, therefore, the prosecutrix in company of her mother had gone to the Police Station where her complaint was recorded by Mr. R.K. Patel, who was then PSI of Sihor Police Station. After registering the offences, necessary investigation was made into the case and incriminating articles which were seized during the course of investigation, were sent to the laboratory for analysis. On completion of investigation, both the appellants were chargesheeted of the offences punishable under Section 376 of the Indian Penal code as well as Section 3(1)(xi) and 3(2)(5) of the Atrocities Act. As the offences registered against the appellants were exclusively triable by Special Court, the case was committed to the Special Court, Bhavnagar, for trial where it was numbered as Sessions Case No. 34/1994. The learned Addl. Sessions Judge and Spl. Judge, Bhavnagar, had framed the charge against the appellants at Exh.3 of the offences punishable under Section 376 of the IPC and

3(1)(xi) and 3(2)(v) of the Atrocities Act. The charge was read over and explained to the appellants who had pleaded not guilty to the same. Therefore, the prosecution had examined (1) Dr. Bhanuben Harilal Shah, PW-1, Exh.10, Dr. Dineshkumar Raghavbhai Makwana, PW-2, Exh.12, Kanaiyalal Labhshankar Jani, PW-3, Exh.15, Shardaben Kesubhai, PW-4, Exh. 17, Arvindbhai Bhayabhai, PW-5, Exh.19, Potiben Lakhabhai, PW-6, Exh.21, Hamalbhai Abhesangh, PW-7, Exh.22, Ratnabhai Lakhabhai, PW-8, Exh.23, Sharadbhai Ratilal Pandya, PW-9, Exh.24, Ramjibhai Mavjibhai, PW10, Exh.26, Hareshkumar Nagindas, PW-17, Ex.28, Champaben Laxmanbhai Jesani, PW-12, Exh.30, Bhalbhadra Balkrushna Purohit, PW-13, Exh.31, Shantilal Bhaganlal Bhatt, Pw-14, Exh. 34, Rajakbhai Ibrahimbhai, PW-15, Exh.38, Harshadrai Bhanushankar, PW-16, Exh.40, Anantrai Bhalvantrai Rajguru, PW-17, Exh.42, Kalubhai Jivabhai, PW-18, Exh.44, Ramanbhai Kodarbhai Patel, PW-19, Exh.46, to prove its case against the appellants. The prosecution had also produced documentary evidence, such as, certificate issued by Dr. Bhanuben after examining the prosecutrix Shardaben at Exh.11, certificate indicating the date of birth of the prosecutrix at Exh. 16, complaint lodged by prosecutrix at Exh.18, panchnama of seizure of clothes of the appellants, panchnama of place of occurrence, etc. in support of its case against the appellants. After recording of evidence of the prosecution witnesses was over, the learned Judge had explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statement as required by Sec. 313 of the Code of Criminal Procedure. In their further statements, the appellants had denied the case of the prosecution but had not led any evidence in support of their defence.

3. On appreciation of the evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that the prosecutrix was belonging to scheduled caste and was minor on the date of the incident. According to the learned Judge, the evidence of the prosecutrix was reliable as well as inspiring confidence and her evidence established beyond reasonable doubt that the appellants had committed rape on her, after putting her to fear of life. The learned Judge further deduced that it was also proved by the prosecution that the appellants had committed offences punishable under Section 3(1)(xi) and 3(2)(v) of the Atrocities Act, but, it was not established by the prosecution that the appellants had committed any offence punishable under Section 13 of the Bombay Police Act. In view of the above referred to conclusions, the learned

Judge has convicted the appellants of the offences punishable under Section 376 of the IPC as well as Sec.3(1)(xi) and Sec. 3(2)(v) of the Atrocities Act and imposed punishments referred to earlier by judgment dated February 15, 1995, giving rise to the above numbered two Appeals.

4. Mr. B.S. Supehia, learned counsel for the appellants submitted that no cogent evidence has been adduced by the prosecution to establish that the prosecutrix was minor on the date of incident whereas the evidence of Dr. Bhanuben Harilal Shah, PW-1, Exh. 10 establishes that the age of the prosecutrix was between 17 years and 19 years and as the prosecutrix was used to sexual intercourse, the conviction of the appellants under Section 376 of the Indian Penal Code should be set aside. What was emphasized by the learned counsel for the appellant was that on physical examination of the prosecutrix, no marks of injury were found on her nor the report of the Doctor indicates that she was subjected to forcible sexual intercourse and, therefore, the conviction of the appellants under Section 376 of the IPC is not warranted at all. According to the learned counsel for the appellants, it is not established by the prosecution that the appellants had assaulted or used force to the prosecutrix, who is belonging to the scheduled caste with intent to dishonour or outrage her modesty and, therefore, the appellants could not have been convicted of the offence punishable under Sec. 3(1)(ix) of the Atrocities Act. It was asserted that no evidence worth the name is adduced by the prosecution to establish that the appellants had committed any offence under the Indian Penal Code punishable with imprisonment for a term of 10 years or more against the prosecutrix on the ground that the prosecutrix was a member of schedule caste and, therefore, none of the appellants could have been convicted of the offences punishable under Sec. 3(2)(v) of the Atrocities Act. Learned Counsel contended that the reasons given by the learned Judge for convicting the appellants under the provisions of IPC and the Atrocities Act, are contrary to the evidence on record and the Appeals should be accepted. In support of his submission, learned counsel for the appellants has placed reliance on the decision of the Supreme Court in MASUMSHA HASANASHA MUSALMAN vs. STATE OF MAHARASHTRA, reported in AIR 2000 SC 1876.

5. Ms. Nandini Joshi, learned Addl. Public Prosecutor pleaded that the evidence of the prosecutrix is not only natural but inspiring confidence and as she has narrated the incident as it had happened, her

evidence should be accepted by the court. According to the learned Counsel for the respondent, absence of injury or non-mentioning of the fact in the report of the Doctor that she was subjected to forcible sexual intercourse is of no consequence, and in view of the consistent testimony given by the victim, conviction of the appellants under Section 376 of the IPC should be upheld by the Court. Learned APP further urged that the evidence of prosecutrix stands materially corroborated by the contents of the complaint filed by her as well as by other evidence on record, namely, that of Arvindbhai Bhayabhai, PW-5 Exh.19, Potiben Lakhabhai, Pw-6, Exh. 21, who is mother of the prosecutrix, Hamalbhai Abhesangh, PW-7, Exh.22, who had recommended the appellant in Criminal Appeal No.491/95 to take the prosecutrix to Sihor and, therefore, no error is committed by the learned Judge in convicting the appellants of the offence punishable under Section 376 of the IPC. According to the learned counsel for the State Government, both the appellants had knowledge that the prosecutrix belongs to scheduled caste and therefore their conviction of the offences punishable under Sections 3(1)(xi) and 3(2)(v) of the Atrocities Act cannot be regarded as illegal. The learned APP further asserted that cogent reasons have been given by the learned Judge for convicting the appellants under Section 376 of the IPC as well as for the offences punishable under the Atrocities Act, the appeals should be dismissed.

6. We have considered the submissions advanced at the Bar by the learned counsel for the parties and re-appreciated the whole evidence on record. Potiben Lakhabhai - PW6 Exh. 21 who is mother of the prosecutrix has stated in her substantive evidence before the court that Shardaben i.e. prosecutrix was aged about 14 years when the incident had taken place. This statement made by the mother of the prosecutrix is not challenged on behalf of the appellants at all. Before the incident of rape was disclosed, the maternal uncle of the prosecutrix had given the information at the Police Station which is produced on the record of the case at Exh. 20, wherein also the age of the girl is mentioned to be 14 years. The prosecutrix in her complaint as well as her deposition before the court has stated that her age was 14 years at the time when the incident had taken place. More over, the certificate of birth issued by Mr. K.L. Jani, who was the then Principal of Usrad Primary School produced on the record of the case at Exh.16 indicates that the date of birth of the prosecutrix was June 1, 1979 meaning thereby that on the date of incident, the

prosecutrix was a minor girl. It needs to be mentioned that Mr. Jani had issued certificate of birth of the prosecutrix on the basis of register which was maintained in the regular course. It is true that Dr. Bhanuben Harilal Shah, PW1 Exh. 10, who had examined the prosecutrix has given an opinion that the age of the prosecutrix was between 17 and 19 years. However, the opinion of the Doctor cannot outweigh the evidentiary value of the birth certificate issued by the former Principal of the school where the prosecutrix had studied or the evidence of mother and close relatives who have special knowledge regarding the age of the prosecutrix and who have consistently deposed about the age of the prosecutrix. Under the circumstances, we are of the opinion that the learned Judge did not commit any error in holding that the prosecutrix was a minor girl at the time of incident.

7. Coming to the evidence of the prosecutrix, we find that she has clearly stated that she had not cooked the food on the date of incident and, therefore, she was scolded by her mother. According to her, she had apprehended that she would be further scolded by the mother and, therefore, when she was sent to bring a match box, she had decided to go to the house of her grand father, who was staying at Sihor. According to her, Hamalbhai, PW-7 Exh.22, had made arrangement for her to sit in the rickshaw, which was being driven by the appellant in Criminal Appeal No.491/95, and that, part of the front seat also occupied by the appellant in Criminal Appeal No. 435/95. What is mentioned by her in her testimony is that on way to Sihor, after crossing the culvert, the rickshaw was stopped by another rickshaw, which was coming from opposite direction and all were asked to alight from the rickshaw. The prosecutrix has clearly stated that the passengers had left the place whereas both the accused had taken her to a nearby field and after putting her to fear of life, had subjected her to rape one after another. In her cross-examination, she has stated that she was not knowing as to who the two passengers were, and she also admitted that there was darkness at the place where the rape was committed on her. We find that though she was subjected to searching cross-examination by the learned counsel for the appellants, nothing could be brought on record of the case which could shake her testimony before the Court. There are no major contradictions or improvements in her evidence. On reappreciation of her evidence, it becomes clear that she has narrated the incident in a forthright manner. Further she is corroborated in material particulars by the complaint which was filed by her

without losing any time. Moreover, her evidence also gets corroboration from the evidence of her mother Potiben Lakhabhai, PW-6, Exh. 21, Hamalbhai Abhesangh, PW-7, Exh.22 and Arvindbhai Bhayabhai, PW-5, Exh.19, etc.

8. The Supreme Court in SHRI BODHISATTWA GAUTAM vs.MISS SUBHRA CHAKRABORTY, reported in AIr 1996 SC 922, has held that rape is not only a crime against the person of a woman, it is a crime against the entire society. According to the Supreme Court, it destroys the entire psychology of a woman and pushes her into deep emotional crises. What is explained therein is that it is only by her sheer will power that she rehabilitates herself in the society, which, on coming to know of the rape, looks down upon her in derision and contempt and, therefore, the rape must be treated as the most hated crime. The principles of law as to how the evidence of a prosecutrix should be appreciated have been laid down by the Supreme Court in BHARWADA BHOGINBHAI HIRJIBHAI vs. STATE OF GUJARAT, reported in AIR 1983 SC 753. The Supreme Court in the said decision has ruled that corroboration is not a sine qua non for a conviction in a rape case because in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. After explaining that on principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness, what is emphasized therein is that just as a witness who has sustained an injury, which is not shown or believed to be inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. Applying the principles laid down by the Supreme Court to the facts of the present case, we find that even in absence of corroboration, the evidence of prosecutrix Shardaben Kesubhai deserves to be accepted because the same is trustworthy and does not suffer from either material contradictions or major improvements. As noted earlier, the evidence of the prosecutrix gets corroboration from the other evidence on record and, therefore, it cannot be said that the conviction of the appellants of the offence punishable under Section 376 of the IPC is in any manner erroneous or illegal. Regarding absence of injuries on the victim, the Supreme Court before 20 years in RAFIQ vs. STATE OF U.P., AIR 1981 SC 559 has explained that absence of injuries on the person of victim is not fatal at all. Again in HARPAL SINGH vs. STATE OF HIMACHAL PRADESH, AIR 1981 361, it is held that fact that no injury was caused to private part or that the victim was used to sexual intercourse is immaterial,

if evidence of victim shows that she was subjected to sexual intercourse against her wish. In the present case, it is not the case of the victim that she had offered resistance because she was threatened with her life by knife and in such circumstances, absence of injuries would not tilt the balance in favour of the appellants. Having regard to overall facts of the case, we are of the opinion that the conviction of the appellants under Section 376 as well as the punishment imposed on them are well founded and will have to be upheld.

9. So far as the offences punishable under the Atrocities Act are concerned, we find that the appellants had assaulted and used force to the prosecutrix belonging to scheduled caste with intent to dishonour or outrage her modesty, which is quite evident from the evidence of the prosecutrix and, therefore as all the elements which constitute offence punishable under Section 3(1)(xi) are established, we are of the opinion that the conviction of the appellants under Section 3(1)(xi) of the Atrocities Act, is well founded, and need not be interfered with by us in the present appeals. However, there is no evidence on the record of the case to establish that the appellants had committed any of the offences under the IPC punishable with imprisonment for a term of 10 years or more against the prosecutrix on the ground that the prosecutrix was a member of scheduled caste and, therefore, the conviction of the appellants under Section 3(2)(v) of the Atrocities Act and the punishment imposed therefore are liable to be set aside. In Masumsha Hasanasha Musalman (supra) the Supreme Court has considered the scheme of Sec. 3(2)(v) of the Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Act, 1989. In the said case, the person belonging to scheduled caste was murdered and the Sessions Court as well as the High Court had convicted the appellant of the offence punishable under Section3(2)(v) of the said Act. While setting aside the conviction of the appellant under Section 3(2)(v) of the Atrocities Act, the Supreme Court has observed in Para-9 of the judgment as under :

" Section 3(2)(v) of the Act provides that whoever, not being a member of the Scheduled Caste or a Scheduled Tribe, commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for

> life and with fine. In the present case, there is no evidence at all to the effect that the appellant committed the offence alleged against him on the ground that the deceased is a member of a Scheduled Caste or a Scheduled Tribe. To attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Indian Penal Code is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under Section 3(2)(v) of the Act arises. In that view of the matter, we think, both the Trial Court and the High Court missed the essence of this aspect. In these circumstances, the conviction under the aforesaid provision by the Trial Court as well as by the High Court ought to be set aside."

10. Applying the principle of law laid down by the Supreme Court to the facts of the present case, we find that the prosecution has not led any evidence to establish that the appellants had committed offence under Section 376 of the Indian Penal Code against the prosecutrix on the ground that the prosecutrix was a member of a scheduled caste and therefore the conviction of the appellants under Section 3(2)(v) is liable to be set aside.

11. For the foregoing reasons, both the Appeals partly succeed. The conviction of the appellants of the offence punishable under Section 376 of the Indian Penal Code and Section 3(1)(ix) of the Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities) Act, 1989 as well as sentences imposed for the commission of those offences is hereby upheld. It is already clarified by the learned Sessions Judge that sentences which are imposed on the appellants shall run concurrently and again we observe that the sentences which have been imposed on the appellants shall run concurrently. The conviction of the appellants of the offence punishable under Section 3(2)(v) of the Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities Act), 1989 as well as the sentence of R.I. for life imposed for the commission of said offence is hereby set aside. Mudamal to be disposed of as per the direction given by the learned Session Judge in the impugned judgment.

(J.M. Panchal, J.) (J.R. Vora, J.)